U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 16 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a delicatessen and convenience store. It seeks to employ the beneficiary permanently in the United States as a business process management analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and asserts that the director failed to properly consider the additional financial documentation and information presented as to the petitioner's true financial ability to pay the proffered wage.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The ETA Form 9089 was accepted on December 22, 2006 and certified on December 29, 2006 on behalf of the beneficiary. The proffered wage as stated on the ETA Form 9089 is $90,000 per year. The instant Form I-140 petition was submitted on March 20, 2007. On the petition, the petitioner claimed to have been established in 2003, to have 11 employees. The beneficiary did not claim to have worked for the petitioner on the ETA Form 9089.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal, the petitioner submitted a brief in which counsel argues that the director should have considered the additional financial documentation and information presented in determining the petitioner's true financial ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, neither the petitioner nor the beneficiary claimed that the beneficiary worked for the petitioner and the record does not contain any documentary evidence, such as the beneficiary's W-2 form, 1099 form or paystubs, showing that the petitioner hired and paid the beneficiary in the relevant years. Therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the full proffered wage in 2006 through the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, counsel did not submit any additional evidence on appeal.

(S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). On appeal, counsel asserts that the petitioner's revenues and payroll indicated in the petitioner's letter and its certified public accountant (CPA)'s letter should be considered in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The evidence in the record of proceeding shows that the petitioner was structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. The record contains the petitioner's federal income tax returns for 2004 through

2006. As previously indicated, the priority date in this matter falls on December 22, 2006, and therefore, the petitioner's tax returns fro 2004 and 2005 are not necessarily dispositive. The petitioner's tax returns demonstrate its net income as shown below.

- In 2004, the Form 1120S stated net income[2] of ($176).
- In 2005, the Form 1120S stated net income of ($13,644).
- In 2006, the Form 1120S stated net income of $50,085.

Therefore, for the year of 2006, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage of $90,000. While the petitioner's tax returns for 2004 and 2005 are not necessarily dispositive, its net income for 2004 and 2005 would be insufficient to pay the proffered wage even if we had considered these two years' tax returns.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 through 2006 as shown below.

- In 2004, the Form 1120S stated net current assets of $13,624.
- In 2005, the Form 1120S stated net current assets of ($7,148).
- In 2006, the Form 1120S stated net current assets of ($14,047).

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

For the years 2004 through 2006, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage. The record does not contain any other regulatory-prescribed evidence, such as annual reports or audited financial statements, to establish the petitioner's ability to pay the proffered wage for 2006. The record shows that counsel filed the instant appeal on June 20, 2008. As of that date the petitioner's federal tax return for 2007 should have been available. However, counsel did not submit the petitioner's 2007 tax return, annual report or audited financial statements, nor did counsel explain why any of these forms of evidence was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns, annual reports or audited financial statements would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The petitioner failure to establish its ability to pay the proffered wage in 2007 because it failed to submit regulatory-prescribed evidence for 2007.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the instant beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel argues that the petitioner's ability to pay the proffered wage has been established with evidence in the record such as bank statements, the letter from the petitioner's certified public accountant (CPA), affidavit of [redacted] and his personal saving account statements, expenses paid to subcontractors and totality of circumstances.

Counsel asserts that the bank statements submitted in the record evidence that the liquid cash reserve or the net current assets at the petitioner's disposal at any given month since the establishment of the priority date as December 22, 2006 averages $20,000 and thereby the petitioner has overwhelmingly established its ability to pay by virtue of having its net current assets being greater or equal to the proffered wage of $90,000. However, counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, any funds used in one month would no longer be available in future months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The record contains an undated letter from [redacted] as the petitioner's CPA stating that the petitioner has ample cash flow to justify hiring an employee with a $90,000 annual salary. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. A letter from the petitioner's CPA cannot be considered as audited financial statements. Therefore, counsel's reliance on a letter from CPA is misplaced.

The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[4] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a business process management analyst will significantly increase profits for a grocery and delicatessen store. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel also asserts that the petitioner may use expenses paid to subcontractors to establish its ability to pay the proffered wage. Counsel implicitly advised that the beneficiary would replace subcontractors. The record does not, however, name these workers or subcontractors, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the subcontractors involve the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced them. In addition, the record contains no evidence that the petitioner used any subcontractors and paid any compensation to the subcontractors. The Schedule A to the Form 1120S reflects that the petitioner did not report any

[4] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

amounts as cost of labor on its tax returns. Therefore, this hypothesis cannot be considered as an alternate method for the petitioner to establish its ability to pay the proffered wage in this matter.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [redacted] holds 100 percent of the company's stock. According to the petitioner's IRS Form 1120S Line 7, Compensation of Officers, and its statement 1, [redacted] elected to pay himself $41,600, $41,600, and $54,600 in 2004, 2005 and 2006 respectively. However, these figures are supported by [redacted] W-2 Forms and we note here that while the compensation received by the company's owner during the year of 2006 was different from the other two years, the compensation of the officers was a fixed salary. In general, salaries and wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, contrary to counsel's assertion, the AAO may not "pierce the corporate veil" and look to [redacted] personal assets other than the compensation of the officer to satisfy the corporation's ability to pay the proffered wage. Counsel's reliance on the balance of [redacted] personal saving account and income other than his compensation of the officer is misplaced.

In the present case, as previously discussed, the petitioner's figures for compensation of officers paid to the petitioner's sole shareholder may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income, however, the figures are not supported by the petitioner's Quarterly Federal Tax Returns (Form 941) and the sole shareholder's W-2 forms. This office notes that counsel submits an affidavit of [redacted] stating that he is willing to forgo his compensation of officer to pay the beneficiary the proffered wage of $90,000. The record, however, does not contain any evidence showing that the sole shareholder could be able to forgo his compensation to pay the beneficiary the proffered wage. The record contains [redacted] Form 1040 U.S. Individual Income Tax Return for 2006. On the Form 1040, he reported his family's wages, salaries, tips income of $105,040, and profit income from the petitioner of $50,135. Counsel did not attach any W-2 forms for the wages income of $105,040. If the petitioner had used all its net income of $50,085 as part of the funds to pay the beneficiary the proffered wage of $90,000 for

2006, then [redacted] would need to forgo at least $39,915 from his officer's compensation of $54,600, and thus, the sole shareholder's family would have balance of $65,125 after deducting $39,925 from the wages and salaries income of $105,040[5] to support the family of five. It is not clear whether the family of five could survive with the balance of $65,125 since the record does not contain any statements for the family's monthly or yearly living expenses. However, this office also notes from Schedule A – Itemized Deduction to the Form 1040 that the family reported $66,592 as a total itemized deductions for the family for 2006. Since the itemized deductions are not the total living expenses, and do not include any non-deductable living expenses such as food, clothing, transportation and all other ordinary living expenses, it is reasonably concluded that the sole shareholder's family did not have sufficient income to forgo the sole shareholder's compensation of officer to pay the beneficiary the short of the proffered wage as well as to support the family of five. Therefore, the AAO finds that the petitioner failed to establish its ability to pay the beneficiary the proffered wage for 2006 even if it had proved that it could use the compensation of officer as additional funds to pay the proffered wage.

Moreover, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed an additional Immigrant Petition for Alien Worker (Form I-140) as well as several I-129 nonimmigrant petitions. USCIS record shows that the petitioner has one approved I-140 petition.[6] Since the instant petition is currently pending with this office as of the date, the petitioner would need to demonstrate its ability to pay two proffered wages in 2009 and 2010. However, the record does not contain any documentary evidence showing that the petitioner paid the two beneficiaries the proffered wages or had sufficient net income or net current assets to pay the two proffered wages in 2009 and 2010. Therefore, the AAO cannot determine whether the petitioner has established its ability to pay the two proffered wages for these two years.

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[5] Since the sole shareholder's profit income of $50,135 had already used as the petitioner's net income to pay the beneficiary a partial proffered wage, it cannot be deducted from the total adjusted gross income of $155,259 but only from the total of wages income of $105,040.

[6] [redacted] filed on June 1, 2010 with the priority date of May 5, 2009 and approved by Texas Service Center on June 9, 2010.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to establish its ability to pay the proffered wage for a single year since the year of the priority date. Counsel's assertions on appeal without supporting documents do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). No unusual circumstances has been shown to exist in this case to parallel those in *Sonegawa,* nor has it been established that 2006 was an uncharacteristically unprofitable year for the petitioner. Given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.